was happening, that the beat man spotted him and that he had previously stayed on top of the building for about an hour watching the beat man patrolling the beat. He said he bought the radios at Olson's Radio for $300, that the batteries gave out.

The officers asked Arrington how, with all this concrete and steel, he planned on getting into the place. He said, "We had that all set up. I went out and bought me a bit that cost me $1800 and it could bore through all this concrete and steel; you have your drill in a wall, pull it out, remove the core out of the bit, then drill it back in the wall again," a repeated process. Asked how he got the rest of the tools, he answered that for a job like that "you get nothing but the best. This kit of tools cost me $3,000." He commented that if he had left when he first saw the beat man all he would have lost was $3,000 worth of equipment.

Arrington said he injured his leg jumping off a roof twice as high as the emergency room wall.

Asked what they were going to do with the $800,000, Arrington answered: "What can you do with that kind of money? You can't hide it, you can't put it in a bank, you can't put it in safety deposit box; some man like me come along and steal it again. So I just live it up and have a good time, do a little gambling so that I like to live it up while the money lasts. When the money is all gone I go out, pull another job and get some more money."

He told the officers that on a trip to New York he had traded his Lincoln in on a new fully equipped, air conditioned car and he paid over $1800 on that, and added, "From the looks of things I'm not even going to get a chance to ride in that now."

Arrington also told the officers that the best time to pull such a job was on the first shift, that they stay away from the other two shifts; that when they want to pull a

job of this nature they could get an ADT man so as to have a man inside who "could jump over any wires when they want to go inside the bank," that they could get in contact with three ADT men who would do this.

While awaiting trial in the case at bar, Arrington jumped bail, fled to Birmingham, Alabama, and after his whereabouts had been discovered he was returned to Cleveland in the custody of Cleveland police officers and held at the county jail. He sent a message from the jail to **Lt. Thomas White,** then chief of the burglary squad, that he wanted to speak to White privately. On March 12, 1963, White saw Arrington in the county jail. Arrington told White he was interested in the circumstances which caused his arrest at Birmingham, Alabama. He said a man named Gaye in the jail told him that he, Gaye, had been stopped by some men in a big blue Oldsmobile. Arrington said he knew a man by the name of Richard Stewart who had such an Oldsmobile sedan. Arrington was of the opinion that Richard Stewart and one Allan Walsch were two of the men who along with Dominick Lonardo had talked with Gaye and through him learned where Arrington had fled, and that they caused his arrest in Birmingham. Arrington told Lt. White that Stewart and Walsch had no business doing anything to cause his arrest, "Because I know plenty about them," "You have been trying to get Dick Stewart for a long time," he said, "I can help you get him." (R. 577-579.)

Lt. White told Arrington he was interested in hearing his story. Arrington said, first of all, he wanted to find out if Dick Stewart and Allan Walsch actually did help Dominick Lonardo in locating Arrington in Alabama. White told him he would make a few inquiries and see if he could find out if they had anything to do with it. (R. 580.)

Lt. White reminded Arrington that when the police had asked him in September if any other persons were involved in this crime, he just laughed and didn't want to discuss it. Lt. White further reminded Arrington that if he should tell the truth about any accomplices the police would expect him to furnish some evidence to substantiate his accusations; that if he lied about any of these people he might expect some consequences from them; that Arrington answered, "That doesn't bother me, I can take care of him and if I get a chance, I will kill him." (R. 580.)

Lt. White said he would see what he could do. He returned to the jail to talk to Arrington on March 25th, at which time he told Arrington that Stewart and Walsch were with Dominick Lonardo when they talked about Arrington's whereabouts. Arrington asked Lt. White, "If I could help you with them, what can you do for me?" Lt. White said he could not do anything or promise anything. He offered to arrange a meeting with the County Prosecutor to discuss the matter. Arrington then said, "I can give you a lot of things you want to know." (R. 581.)

Lt. White then asked Arrington about the bank burglary at Portage and Broadway the Labor Day weekend of 1962. Arrington said the men with him were Charles Polizzi, Albert Oponowicz and Richard Stewart, and that Stewart had been seen by a police officer and had fled, and in the resulting police action Arrington, Oponowicz and Polizzi were arrested. Asked what he had to show that Stewart was there, Arrington said, "Well, I will tell you when we sit down with Mr. Corrigan." (R. 581.)

Lt. White asked Arrington if he was involved in other similar crimes in 1962 in the Cleveland area, and he said he was not, but when asked about the Cleveland Trust Bank burglary at 105th and St. Clair in July 1962, Arrington answered, "I was on that and with me were Albert

Oponowicz, Charles Polizzi, Richard Stewart and Allan Walsch." (R. 582.) He said that they got in from the basement, he wasn't inside but was outside as a lookout, that he and Walsch had the walkie-talkies that were later found by the police in Polizzi's car at Portage and Broadway in September 1962. He was asked by Lt. White if he was taken along in the Portage and Broadway burglary just to carry the heavy tools, and answered, "No, I am a pretty good box man, everybody knows that." (R. 582.)

The following appears in cross-examination of Lt. White by defense counsel (R. 623, 624, 625):

"Q. What was the first thing that was said (in Mr. Corrigan's office)?

A. Well, I think I explained to Mr. Corrigan that Joe Arrington had sent for me, and he wished to talk with both Mr. Corrigan and I.

Q. Was Mr. Arrington there at that time?

A. Yes. And that he (Arrington) was interested in getting some consideration from the Prosecutor's office.

And in return for some help that he could give his office and the police department.

Mr. Corrigan told him that there was no way that he could reduce the charges then pending against Mr. Arrington.

Q. * * * and Joe Arrington went on to narrate to you and Mr. Corrigan about how he burglarized the bank on 104th Street?

A. He was part of the group * * *.

Q. And he related the burglary of the 104th Street Bank?

A. Yes.

Q. He related the burglary of the 57th Street Bank?

A. Right.

Q. He advised that he did these things?

A. Yes.

Q. Did this strike you as unusual?
A. No.
Q. No?
A. No. He said he wanted to get even with Dick Stewart."

John T. Corrigan, Prosecuting Attorney, testified that Arrington was brought to his office on March 28, 1963 by a deputy sheriff. Lt. White was the only other person present in Mr. Corrigan's office, Arrington having requested that the deputy sheriff be asked to leave the room. Mr. Corrigan said to Arrington that it was his understanding that Arrington desired to talk to Lt. White and himself. Arrington responded in the affirmative. Mr. Corrigan informed Arrington that he was charged with a serious crime, that he was represented by counsel, that he had a right not to speak to them if he so desired, that they would be appreciative of anything he would tell them but he could expect no consideration whatever in turn for whatever information he would give them.

Arrington said the purpose of wanting to talk to Lt. White and Mr. Corrigan was because he felt that a man named Dick Stewart was responsible for his being apprehended in Alabama and he was desirous of giving us Dick Stewart.

Mr. Corrigan testified that Arrington proceeded to tell them that Dick Stewart, Oponowicz, Polizzi and he had perpetrated the bank burglary at 57th and Broadway, and that these four, along with Allan Walsch, had previously perpetrated the bank burglary of the Cleveland Trust at 105th and St. Clair.

In the course of the conversation Arrington asked, "Is this office bugged?" and was told it was not bugged. He also indicated he wanted to talk to Mr. Corrigan alone. Mr. Corrigan said he would not talk to him out of the presence of Lt. White or some other officer. The conversa-

tion was not elicited by interrogation; it was a narrative statement by Arrington, for his stated purpose of delivering Dick Stewart to the authorities. (R. 789.)

Chief of Police Richard Wagner received word around April 1, 1963 that Arrington wanted to see him, that he had some important information for him. Chief Wagner immediately informed Mr. Corrigan of this and arrangements were made to see Arrington together within the week of April 1st. They met in Mr. Corrigan's office. Arrington said to Chief Wagner that he had some information he thought would be of interest to the officer and that, of course, he wanted to help himself. At that point Mr. Corrigan warned Arrington that there would be no deals made with respect to him and the present case, but they would listen to what he had to say and if he were helpful to the State, the proper officials would be notified of his helpfulness at the proper time.

Arrington reiterated that he wanted to talk to them for the purpose of giving them Dick Stewart because Stewart was the man responsible for having him apprehended in Alabama.

The things he told Chief Wagner and Mr. Corrigan in this conversation were substantially the same as he had said when he talked with Mr. Corrigan and Lt. White. (R. 791.)

On cross-examination of Chief Wagner, the following was developed:

> That he was first informed that Joe Arrington wanted to see him by FBI agent O'Hara who told the Chief that Arrington said that he had some important information that Arrington wanted to give the Chief. (R. 637.)
>
> That Arrington said that Dick Stewart had burglarized the bank. (R. 641.)
>
> That Joe Arrington told me (Chief Wagner) that

he (Stewart) was an accomplice in two bank robberies. (R. 644.)

That he (Corrigan) stated that he would listen, that we would listen to anything Mr. Arrington wanted to say, but that there would be no deals * * *. But that whatever assistance he was able to give the State, any help he would give, would be pointed out to the proper authorities at the proper time * * *. It was my understanding he (Corrigan) was referring to the judge who would be sentencing the defendant. (R. 662, 663, 665.)

That this was not a question and answer "thing" (procedure), but a story, a narration by Arrington * * *. However, several questions were asked during this story. (R. 686.)

He (Arrington) volunteered, he narrated the events of that night * * *. Some questions were asked for clarification * * * there is not an interrogation when somebody is telling an officer something. (R. 730, 731.) "It was an audience given to a man at his request."

The following appears at R. 819-820 in the cross-examination of Mr. Corrigan:

"Q. Did you ask him if he had an attorney?

A. Yes, sir.

Q. What did he say to you?

A. He said that Jerry Milano was his attorney for the moment but he did not know whether or not he was going to stay with Jerry Milano or whether Jerry Milano was going to try his case if he went to trial.

* * *

Q. Didn't you deem it wise that you would call me and inform me of these facts?

A. No, I felt that I had no obligation to inform you of that fact."

At R. 829-830 we find the following in the cross-examination of Mr. Corrigan:

"Q. But now you advised him that you may use it (Arrington's conversation) against him in court?

A. I prefaced my remark when I first spoke with him when he came to my office with the statement to the effect that it was my understanding that he wanted to talk with Lieutenant White and myself, in the first instance, and with Chief Wagner in the second instance. I indicated to him that he was there at his request to talk to us. I indicated to him I was aware that he had counsel, that he had certain rights. I informed him that I could not and would not make any deal with him, that any statement that he made now might be used against him. I indicated, further, that I was desirous of obtaining from him whatever information he would give us. I was desirous of getting cooperation from him. I said, 'Now that you understand this, what do you care to talk about?' Then he proceeded to relate the story that I testified to earlier this morning.

Q. On both occasions you did this?

A. Yes, sir."

ARGUMENT AND LAW.

The questions presented for review and the statement of the case in the petition contain certain unwarranted inferences which we feel should not be permitted to remain unanswered.

Although the petition herein designates the statements in question as "interrogation" of petitioner after indictment, actually no interrogation took place other than a few questions for clarification. The record totally disproves the petitioner's designation of the police and prosecutor as "inquisitors."

In claiming that the case against petitioner was "purely circumstantial" the petition ignores, among other things, the wholly voluntary admissions made to the officers while they were waiting in the hospital emergency

room, as well as the statements made by Arrington when the officers found him on the roof and asked him what he was doing up there.

Contrary to petitioner's claim, the issues at the trial were nowhere close. It is very doubtful that anything that Arrington said in the interviews here under consideration contributed to his conviction.

This case does turn on the question (which the petitioner terms "narrow") of whether the defendant sought the interviews and waived counsel thereat.

The petitioner seeks an absolute rule that "any interrogation of a person under indictment without the knowledge or presence of counsel cannot be squared with due process." Such a rule would constitute a denial of the right of waiver, contrary to the opinions of this Court recognizing such right. In a footnote to Headnote 5 in *Escobedo v. Illinois,* 378 U. S. 478, 12 L. ed. 2d 977, it is stated:

> "The accused may, of cause, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial. See Johnson v. Zerbst, 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019, 146 A. L. R. 357. But no knowing and intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case."

The question was whether the accused had waived their rights to counsel in a trial in a Federal Court, under consideration in *Johnson v. Zerbst,* 304 U. S. 456, 82 L. ed. 1461. In the opinion by Mr. Justice Black, it is stated (304 U. S. 464):

> "It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not pre-

sume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

* * *

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

The Ohio Supreme Court relied on the test laid down in *Johnson v. Zerbst* in its decision in the case of *In re Burson,* 152 Ohio St. 375, wherein it is stated:

"Whether a waiver was made must be determined by the particular facts and circumstances of the case, including a consideration of the background, experience and conduct of the accused. Johnson v. Zerbst, supra (304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019); Buckner v. Hudspeth, Warden, 105 F. (2d) 396; McCoy v. Hudspeth, Warden, 106 F. (2d) 810

* * *

"Whether the petitioner's plea of guilty and consequent waiver of the appointment of counsel was intentional and intelligently made must rest in the sound discretion of the trial judge before whom the plea was taken. * * *"

That there is a clear distinction between the facts in this case and those in *Massiah v. United States*, 377 U. S. 201 is pointed out three times in opinions of the Supreme Court of Ohio in the instant case.

The opinion of O'Neill, J., concurring in the original judgment, states that the "facts in this case differ materially from those in *Escobedo v. State of Illinois; Massiah v. United States*, and *State v. McLeod*." The per curiam opinion of the Court on the motion for reconsideration states:

> "The facts in the instant case bear no resemblance to either *McLeod* or *Massiah*. The record here shows that both statements made by appellant were given voluntarily in narrative form at interviews instigated by him and at his own request, that these were not interrogatory proceedings, and that at both interviews he was informed that the statements could be used against him. At these interviews the fact that he was represented by counsel was discussed by the prosecuting attorney with appellant and apparently appellant did not want his counsel present. The record shows that such statements were motivated by the desire of appellant to 'get even' with one Dick Stewart who caused his apprehension in Alabama.
>
> The trial court, after a full hearing on the question of the suppression of these statements, found that petitioner was not only fully informed of his rights but also that he was well aware of them and intelligently waived them."

And in an opinion concurring in the judgment on reconsideration, Judge O'Neill very well interprets the rationale in *Massiah* and *Escobedo* and the distinction in the instant case, as follows:

> "(1) counsel was not present, (2) because of that fact, or by other means, those in charge of obtaining

evidence imposed upon the accused in order to secure incriminating statements against him.

"Thus, in *Massiah, supra,* government agents used trickery to obtain statements at a time when the accused was unaware of the circumstances under which he was speaking. In *Escobedo, supra,* the accused was browbeaten by police officers, and was denied the right to consult with his attorney, even after requesting that he be allowed to do so. In *McLeod, supra,* the accused was not informed of his rights.

"In the instant case, defendant had an attorney, and had not been denied the right to consult with him at any time. He voluntarily sought out the prosecuting attorney and the chief of police in order to make statements for the purpose of getting revenge upon another. He was informed by the prosecuting attorney, who knew that he was represented by counsel, that he had a right to remain silent, that his statements might be used against him, and that he could expect no consideration for the information he would give. During one of these discussions he indicated that he was dissatisfied with his attorney and might not continue to retain him."

The opinion of the trial court herein is found in Appendix A attached to this brief. The trial court had the duty of testing the credibility of the witnesses. The court concluded that the petitioner had waived any constitutional right to have his counsel with him. It is significant that in overruling the motion the trial court observed that "the defendant is certainly intelligent, he is understanding, and he understands what his rights are, and he is, at least * * * no stranger to a courtroom." (R. 783-84). The trial court held that there was a waiver by Arrington of the right to counsel, stating:

"As to whether it was voluntary and he acted without coercion, I think that is disposed of by the fact that

he initiated that meeting, that he was told of his rights, and that, from the testimony of the Prosecutor, that he did not wish to have his counsel with him. And by this, he waived it."

In recent decisions of the California and Wisconsin Supreme Courts the principle that the right to counsel in connection with a confession may be waived by the accused is recognized. In *State ex rel. Goodchild v. Burke* (March 1965), 27 Wisc. (2d) 244, the Court analyzed the decision in *People v. Dorado*, 42 Cal. 169, 387 Pac. 361, noting that in *Dorado* the California court held that the confession had constitutional defects because, among other things: "(4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights." The opinion of the Wisconsin court continues:

> "However, Dorado is distinguishable. The California court recognized that Escobedo permits an accused to waive counsel, but emphasizes the point that a right which is not known cannot be waived. The crucial fact difference is that Dorado was not advised of any rights in regard to counsel while (defendant) was and expressly waived his right to be represented. Thus point (4) of the holding is not pertinent to the present case."

This Court has denied certiorari in the *Dorado* case.

The decision in another recent California case, *People v. Stewart*, 43 Cal. Rptr. 201, 400 P. 2d 97 (March 1965) discusses the requirements to establish a waiver, as follows:

> "In *Carnely v. Cochran* (1962), 369 U. S. 506, the United States Supreme Court said, 'The record must show, or there must be an allegation and evi-

dence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.' (Id. at p. 516.) It follows that in order to establish a waiver of the right to the assistance of counsel the record must indicate that the defendant was advised of his right to counsel and to remain silent or that he knew of these rights and intelligently and knowingly waived them."

In a situation somewhat similar to the instant case, in *People v. Pizzaro,* 248 N. Y. S. (2) 1007 (1964), the Appellate Division of the Supreme Court of New York said, at page 1008 of the opinion:

"In our opinion, the voluntary and unsolicited admissions of guilt, three and one-half months after indictment, made by defendant to a detective when defendant on his own initiative asked to see the detective and inquired whether it was possible to work out a 'deal' did not constitute the interrogation by law enforcement officers which 'triggers the right to assistance of counsel,' or right to be informed of defendant's privilege against self-incrimination, and hence testimony of such conversation was properly admitted."

The circumstances of Arrington's two interviews in the office of the prosecuting attorney are not similar to those in any of the cases cited in his petition. The general principle of law involved in those cases; to-wit, the right of an accused to have the aid of counsel for his defense, is not in issue here. Neither is there in the cases cited any question of the right of the accused to waive his right to counsel at any stage of the proceedings. In general, the cases cited by petitioner involve situations where either the accused was not informed of his right to counsel or his request to see an attorney was denied prior to or in

the course of his interrogation by the authorities and such denial, in conjunction with other factors, was held to amount to a denial of constitutional rights of the accused so as to render the confession inadmissible.

In the case at bar there is no indication whatever of "refusal by state authorities of the request to contact counsel" which the Court had under consideration in *Spano,* and other cases cited in defendant's brief.

The decision in *Spano v. New York,* 360 U. S. 315, 3 L. ed. 2d 1270, did not turn on the contention of the petitioner therein that following indictment no confession obtained in the absence of counsel could be used without violating the Fourteenth Amendment, concerning which the majority opinion states (3 L. ed. 2d p. 1270):

> "We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles."

The majority of the Court based the reversal on the ground that the confession, obtained by pressure, fatigue and falsely aroused sympathy, had been involuntary, especially since defendant had been refused access to the attorney who surrendered him and who had instructed Spano not to answer.

The opinion in *People v. DiBiasi,* 7 N. Y. 2d 544, 166 N. E. 2d 825, noted that the Supreme Court majority, in *Spano v. New York,* did not directly decide the question of whether following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment. The majority opinion in *DiBiasi* characterized the confession in *Spano* as having been gotten from the defendant by police officers by means of long and unfair questioning after defendant had been indicted

and had surrendered himself. The opinion concluded that the questioning of *DiBiasi* was "testimonial compulsion." In neither *Spano* nor *DiBiasi* was there any suggestion of a waiver of right to counsel.

Contrary to the statement in the petition herein, the New York Appellate Court in *People v. Waterman*, 9 N. Y. 2d 561, 175 N. E. 2d 445 was not presented with the same issues that are raised in the case at bar. The *Waterman* opinion speaks of "secret interrogation of the defendant" and "where, as here, he was not first advised of his privilege and his right to the assistance of counsel." Waterman had been questioned by a police officer on two separate occasions between return of the indictment and his arraignment thereon, the first time in the Tombs in Manhattan where Waterman was then incarcerated on another charge, the second in the detention cells of the Bronx County Building. Whatever secrecy was involved in the interviews with Arrington was at his own instigation.

Petitioner cites *People v. Meyer*, 11 N. Y. 2d 162, 182 N. E. 2d 103, where a voluntary unsolicited statement of the accused to a police officer after arraignment following his arrest but before indictment was held inadmissible by a closely divided (6 to 3) court. The view of Froessel, Judge (dissenting), is as follows:

> "The majority would now extend the rule laid down in People v. DiBiasi, 7 NY 2d 544, 200 NYS 2d 21, 166 NE 2d 825, to the voluntary, unsolicited statements made by defendant immediately after he had been arraigned, advised as to the charge against him, and as to his right to the aid of counsel, * * * which he did not request, and weeks before an indictment had been found against him. Neither the Supreme Court of the United States nor this court has ever gone so far, and I see no warrant for our doing so in this case."

Petitioner also cites *People v. Rodriguez*, 11 N. Y. 2d 279, 183 N. E. 2d 651, where Rodriguez and one Carde were convicted of common-law premeditated murder. Here the court followed the rule it laid down in *People v. Meyer, supra*, that questioning of one of the defendants, in absence of counsel, by police prior to indictment but after an arraignment, violated defendant's right to assistance of counsel. This case is to be distinguished from the case at bar. Rodriguez contended that certain statements of his were improperly received in evidence, that he had been induced to confess after being confronted with a gun and other articles illegally obtained from his room. The Court, speaking through Judge Fuld, said:

> "If as he asserts, any of his statements were the product or fruit of an illegal search and seizure, they should have been excluded."

In the case of Arrington, who was no stranger to the courts, it must be emphasized that he asked for the conferences because he wanted to get even with Richard Stewart, that he already had counsel, and that had he wanted his counsel to know of his desire to give information about Stewart to the authorities, he could have so notified his counsel.

CONCLUSION.

In the instant case, all of the requirements of a valid waiver of the right to have counsel present are fulfilled. Arrington, who was no stranger to the courts, sought the conferences with the prosecuting attorney and the chief of police in order to make statements for the purpose of getting revenge upon another. Not only was he informed of his rights, but his sophistication and knowledge of the courts were such that he knew of his rights when he re-

quested the interviews. There is not the slightest indication that Arrington either asked for or was refused the assistance of counsel. On the contrary, it is apparent that he did not want to have his counsel with him and that he intentionally waived the right to have his attorney present.

The totality of the circumstances uphold the decisions of the trial court and the appellate courts of Ohio that the petitioner herein was not only fully informed of his rights but also that he was well aware of them and intelligently waived them, and that the use of his statements constituted no violation of his rights under the Sixth Amendment to the Constitution as made applicable to the state through the Fourteenth Amendment.

The petitioner has not shown any deprivation of the constitutional right to counsel entitling him to review by this Court. The writ should therefore be denied.

Respectfully submitted,

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DENNIS J. MCGUIRE,
Assistant Prosecuting Attorney,

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Attorneys for Respondent.

APPENDIX "A."

Ruling of the Trial Court re Admissions of Defendant to Prosecutor, After Indictment and Arraignment, in Absence of Defense Counsel. (R. 778-784.)

The Court: All right. The objection to the introduction of the confession is based on, as I understand your argument, on two main grounds; No. 1, that it is a denial of due process to the defendant under the Fourteenth Amendment, under the due process clause. And correlating that to the Ohio Constitution, I would assume you are also arguing that the violation of his Constitutional right, in violation of Article I, Section 10, the pertinent part of which reads as follows:

> "In any trial in any court the party accused shall be allowed to appear and defend in person and with counsel, to demand the nature and cause of the accusation against him, and to have a copy thereof, and to meet the witnesses face to face and to have compulsory process to secure attendance of witnesses in his behalf, and obtain an impartial jury in the county in which the offense is alleged to have been committed. And no person shall be compelled in any criminal case to be a witness against himself."

And I assume, also, you are alluding to Article I, Section 16, entitled Redress in Courts.

> "All courts shall be open and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The second part of your motion to strike the confession is that it is inadmissible because it is involuntary, and the involuntariness of the confession is brought about by the fact that it has been induced by a promise by the County Prosecutor in this case.

Taking them in reverse order for the purpose of logically one following the other in the opinion we must make this assumption of law:

First of all, that the burden of proving that a confession is involuntary is upon the defendant, and the voluntariness of each confession in each case must be viewed and determined by the Court by all of the surrounding circumstances under which the confession was given. And the Court is going to take the position that this confession was voluntary, taking into account all of the circumstances surrounding the giving of this confession. The defendant was the one that initiated the request for the interview. The Prosecutor advised him as to his rights, including his rights to have counsel present, his right not to make a statement if he so desired. And counsel made some reference to the fact that whose words are you going to take?

We have at this point, at least, the word of the Prosecutor, that this advice was given to him. The Court is not prepared at this point to say whether the words that the Prosecutor said to the defendant was a promise. If giving it its—giving the defendant every benefit of the meaning of the words, if it was a promise, that promise certainly did not induce the confession, and any confession that was given, as far as this Court can see, was not given as a result of that promise, if we do, just for the sake of this argument and for the sake of the motion, assume that it was a promise. The Court is not prepared to go that far.

In 22 *Corpus Juris* 2nd, Criminal Law, Paragraph 817, page 145, 1431—

> "Matters which do not affect the voluntary character of the confession do not render it inadmissible as involuntarily made. A confession is not rendered inadmissible by the fact that when it was made persons in

> authority were present or that he was not represented by counsel, or, if represented, his counsel was not present, or because of any other similar fact. A voluntary confession is admissible regardless of where it was made. If the confession was free and voluntary the motive which prompted it is, as a general rule, admitted as affecting said admissibility."

Going on, the *State versus Johnson,* which is the Arizona case previously cited by counsel for the State, *State versus Johnson,* 69 Arizona 203:

> "The law does not in terms respecting whether or not a prosecuting attorney or a police officer shall not secure statements of a defendant after arrest and prior or subsequent to his arraignment; but the introduction of such statements in evidence can be upheld only when they are wholly voluntary."

And I have indicated to you before, all the surrounding circumstances, including the fact that the defendant volunteered to—or initiated the meeting between himself and the County Prosecutor, that he was told that there would be no deal, that he was—what form or manner in which it was given by him—all of these lead the Court to feel that it was voluntary.

And going back to the first point as to whether or not it was a denial of the due process clause of the Fourteenth Amendment, it quotes the section as I have already cited, the Ohio Constitution, the Court feels, and correctly feels that the defendant certainly has a right to the—to counsel, and the pertinent section of the Constitution says that in any trial in any court the party accused shall be allowed to appear and defend in person by eminent counsel.

And the Court is not going to be—limit the trial to the actual proceeding at the time a plea is made, at which time the evidence on the merits wasn't given, but the Court will agree with counsel that trial certainly extends

throughout all of these processes involved from the time of the filing—at the time of the indictment to the conclusion of the trial. But the Court, by the same token, realizes that the defendant, even though he has this right to counsel, may at any time during this process waive his right to that counsel, and, again, all the circumstances of that waiver must be taken into consideration.

I would like to quote 23 *Corpus Juris Secundum*, Section 979, on page 917, entitled "Waiver of Right to Counsel."

> "Except in some jurisdictions in capital cases, the right to appear by and have the assistance of counsel, or to have counsel assigned, is a personal right which the accused may waive provided it is waived intelligently, understandingly, and in a competent manner. The waiver must be voluntary and intentional, without outside pressure or coercion, by one competent to waive his right. There is no absolute requirement that the accused be represented by counsel; and, ordinarily, as stated above, he cannot be compelled to have counsel. As a general rule, accused has the right to be heard in person, and, if necessary, to conduct his own defense if he is mentally capable of acting for himself."

There has been no evidence produced on the part of the defendant that he was not—that this waiver was not given intelligently, understandingly and in a competent manner, or that it was not voluntary, it was without outside pressure or coercion. From what the Court has heard so far, it appears that the defendant is certainly intelligent, he is understanding, and he understands what his rights are, and he is, at least, the little that the Court has been able to surmise from the evidence so far that he is no stranger to a courtroom. As to whether it was voluntary and he acted without coercion, I think that is disposed of

by the fact that he initiated that meeting, that he was told of his rights and that, from the testimony of the Prosecutor, that he did not wish to have his counsel with him. And by this, he waived it.

So that, obviously, the Court, as you can assume from the remarks I have made so far, is going to overrule the motion on the ground of the violation of his Constitutional rights under due process clause and under Article I, Section 10 and Section 16 of the Ohio Constitution. As I have said, it is to be determined by several of the surrounding circumstances: This, too, as well as the voluntariness of the confession. This Court does not say that under the same circumstances, if this defendant were called down to be interrogated, that the ruling would be the same. This Court is not ruling upon the propriety of the act of the County Prosecutor, but the Court is ruling strictly upon the law and the admissibility of this confession at this time under the law.